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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MANNHEIM VIDEO, INC.,
an Illinois Corporation,

Petitioner,

v.

COUNTY OF COOK,
a body politic and corporate,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether Respondent Cook County promptly and correctly argued that the *Younger* abstention doctrine should be applied in favor of state proceedings initiated after the federal action was dismissed but before any proceedings on the merits had taken place in federal court.

Whether the Court of Appeals followed established precedent in finding that where the district court had simply denied in part and allowed in part respondent's motion to dismiss petitioner's complaint for failure to state a cause of action, the federal proceedings were still in an embryonic stage.

Whether petitioner's request that certiorari be granted in order to clarify the language of the opinion below is an attempt to present issues which have been waived by petitioner.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the County of Cook, a body politic and corporate, respectfully requests that the Petition for Writ of Certiorari be denied.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit was rendered on September 20, 1990. Rehearing was denied on November 14, 1989. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 884 F.2d 1043 (7th Cir. 1989).

STATEMENT OF JURISDICTION

The jurisdiction of the Court is properly invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

No statutes or constitutional provisions are directly involved in this appeal.

STATEMENT OF THE CASE

On May 2, 1988, Petitioner, Mannheim Video, Inc. ("Mannheim")[1] filed a lawsuit in the Federal District Court for the Northern District of Illinois challenging the constitutionality of Cook County's Zoning Ordinance, Adult Use Provisions of the County's Zoning Ordinance, C.B. No. 107756 (1981). The ordinance regulates establishments "having as a substantial or significant portion of its stock . . ." materials that are sexually explicit in nature. The ordinance also contains regulations for "adult mini motion picture theaters."

[1] Mannheim operates a video arcade and gift shop within Cook County, Illinois. A portion of Mannheim's business is comprised of sexually explicit materials, including books, magazines and novelties. The Mannheim Video arcade consists of thirteen coin operated booths featuring sexually explicit selections.

Mannheim's complaint which contained three counts sought declaratory and injunctive relief. The first count alleged that the term "substantial or significant portion of its stock" was unconstitutionally vague. The second count alleged that Mannheim's video viewing booths were not theaters within the definition of the ordinance and the third count alleged that the zoning ordinance otherwise impermissively infringed upon Mannheim's First Amendment rights.

At the time Mannheim filed its federal suit, it was already defending a state court action brought by Cook County in 1987 alleging various infractions of the County's building ordinance. The state action against Mannheim did not allege any violations of the adult use zoning ordinance because the case of *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill.2d 123 (1988) in which the Illinois Supreme Court struck down a first amendment challenge to certain portions of the adult use zoning ordinance was then pending on appeal in this Honorable Court. Cook County was waiting to see the outcome of that case before proceeding to enforce the adult use provisions of the ordinance.

Cook County responded to Mannheim's federal complaint by filing a motion to dismiss each of the three counts pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court dismissed Count II finding that "Plaintiff's booths fall squarely within the plain language of the definition of adult mini motion picture theaters." The district court stayed its ruling on Count III, noting "the Illinois Supreme Court's ruling in *Renaissance* has been appealed to the United States Supreme Court. The resolution of that appeal will be binding on this Court as to the sufficiency of plaintiff's claim." Finally, the district court held that the first count involving a vagueness claim concern-

ing the term "substantial or significant" stated a valid claim under *Conley v. Gibson*, 355 U.S. 41 (1957) and refused to dismiss that claim.[2]

On October 11, 1988, this Court dismissed the *Renaissance* appeal sub. nom. *Mannheim Books, Inc. v. County of Cook*, 109 S.Ct. 209-10 (1988) and Count III of Mannheim's Complaint was therefore dismissed. On October 27, 1988, after this Court dismissed the *Renaissance* appeal, Cook County now assured that it had a valid, enforceable adult use ordinance, amended its state court complaint against Mannheim, seeking enforcement proceedings against Mannheim under the adult use zoning ordinance. Mannheim answered the amended state court complaint and asserted a counterclaim raising three counts similar to Mannheim's complaint in the federal district court. Mannheim also filed a motion for preliminary injunction and a temporary restraining order in the federal district court in an attempt to enjoin the County from prosecuting the alleged violations of the adult use zoning ordinance in state court and to compel the County to continue to contest the validity of the ordinance in federal court. Cook County argued that the federal court should not consider plaintiff's complaint on the basis of *Younger* abstention grounds. Thereafter, the district court dismissed the case on the grounds of *Younger* abstention.

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[2] In its response to Cook County's motion to dismiss the attorneys for Mannheim failed to apprise the district court that they had litigated and lost this same issue in the Illinois courts in the case of *City of Chicago v. Scandia Books*, 102 Ill.App.3d 292 (1st Dist. 1981). The attorneys for Mannheim were sharply criticized by the court of appeals in the case below who found that such "ostrich-like" tactics were "an exercise in gall." 884 F.2d at 1046, 1047.

Mannheim appealed the district court's decision to dismiss the suit on the basis of *Younger* arguing that the federal action had progressed beyond an embryonic stage and that substantial findings on the merits of its constitutional claims had been reached. The Court of Appeals for the Seventh Circuit affirmed the district court's decision to dismiss Mannheim's suit *sua sponte* in favor of a parallel state court action.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

RESPONDENT COOK COUNTY PROMPTLY AND CORRECTLY ARGUED THAT THE *YOUNGER* ABSTENTION SHOULD BE APPLIED IN FAVOR OF STATE PROCEEDINGS WHICH WERE INITIATED AFTER THE FEDERAL ACTION WAS FILED, BUT BEFORE ANY PROCEEDINGS ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT.

Petitioner contends first that Respondent, County of Cook, waived its right to *Younger* abstention by allegedly ". . . failing to insist upon such an abstention before presenting its contentions in the federal court." (Petition at 11) Respondent maintains that the *Younger* abstention argument was raised at the earliest appropriate time and the waiver argument now raised by Petitioner is based on a mischaracterization of the facts and law pertaining to the circumstances involved in this case. Therefore, the petition for writ of certiorari should be denied.

In an attempt to convince this Honorable Court that this case warrants the exercise of its extraordinary and

discretionary jurisdiction, Petitioner alleges there is a conflict among circuits concerning the waiver rules which some circuits apply under the *Younger* doctrine. (Petition at 12) However, the allegedly conflicting decisions relied upon by Petitioner are patently distinguishable on the basis of their facts. Furthermore, the facts in this case establish that the County of Cook promptly and correctly raised abstention at the earliest possible time in the district court when parallel state proceedings were initiated and before any proceedings on the merits had taken place in the federal action. Thus, no waiver of the abstention argument occurred.

This Court held in *Hicks v. Miranda*, 422 U.S. 332, 350 (1975) that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any substantial proceedings on the merits have taken place in the federal court the principles of *Younger v. Harris*, 404 U.S. 37 (1971), should apply in full force." *See also, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Here, when petitioner filed this suit in the instant case in May, 1988 in federal court it was already defending a state action brought by the County of Cook in April, 1987. The state action alleged various infractions of the Cook County building ordinances, but did not and could not allege any violations of the adult use zoning ordinances, because *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill.2d 123 (1988) in which the constitutionality of certain parts of the adult zoning ordinance had been challenged was pending on appeal in this Court.

Since no parallel state action existed at the time Petitioner filed its federal court action, County of Cook could not raise abstention as a basis for dismissing the federal

suit. In accordance with the Federal Rules of Civil Procedure, Cook County responded to Petitioner's complaint by moving to dismiss each of the three counts contained in the complaint for failing to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). In ruling on the motion, the district court dismissed the second count, finding that Petitioner's video booths fell squarely within the ordinance definition of a "mini theater" and stayed the third count pending this Court's disposition of the appeal in *Renaissance Arcade*. Finally, the district court held that the first count stated a valid claim under *Conley v. Gibson*, 355 U.S. 41 (1957).

On October 11, 1988, this Court summarily dismissed the appeal in *Renaissance Arcade*, sub. nom. *Mannheim Books v. County of Cook*, 109 S.Ct. 209 (1988). On October 27, 1988, Cook County, on the basis that the Cook County ordinance had now been upheld by this Court amended its pending state complaint against Petitioner to include violations of the adult use zoning ordinance. Petitioner answered the state court complaint and asserted a counterclaim similar to its claims pending in federal court. Petitioner also moved the district court to enjoin the County from prosecuting the violations of the adult use zoning ordinance in state court and to compel the County to continue to contest the constitutionality of the ordinance in federal court.

In response to Mannheim's motion, Cook County argued abstention. The district court agreed that abstention was appropriate in that the state action now essentially included the same claim as was being asserted in federal court and dismissed the federal action in favor of the state action, citing *Younger v. Harris*, 401 U.S. 37 (1971). The district court also found that the County's decision to wait

for this Court's ruling on the *Renaissance* appeal prior to initiating any further litigation under the adult use provisions was done in good faith.

It is clear that Cook County's decision not to file claims under the adult use ordinance while it was under consideration by the United States Supreme Court was entirely appropriate, and cannot be characterized as "forum shopping." Despite Petitioner's claim to the contrary, the instant case does not involve a situation wherein the County of Cook voluntarily choose to submit to a federal forum and then sought abstention when it feared an adverse ruling by the federal court. Petitioner's unfounded accusations are an example of Petitioner's manipulation of the facts and law to suit its own purposes which have occurred throughout this case in the courts below.

For example, Petitioner conveniently fails to point out that it was Petitioner who filed suit in federal court and chose the federal forum to raise its constitutional challenge to the County ordinance. Moreover, it is now apparent that Petitioner did so knowing that the constitutional challenges which petitioner now claims would have been decided in its favor by the district court had previously been rejected in state court. *See, City of Chicago v. Scandia Books*, 102 Ill.App.3d 292 (1st Dist. 1981) Petitioner nevertheless failed to direct the district court's attention to this state authority. Thus, it was petitioner, not respondent who chose the federal forum in order to avoid the consequences of the state authority contrary to its position.

Furthermore, the case law cited by Petitioner in support of its waiver argument is inapposite to the fact situation in the case at bar. Thus, this case does not involve a conflict among circuits which needs to be addressed by this Court.

For example, in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), plaintiff Hodry sued the Bureau of Employment services in federal court, seeking declaratory relief from an Ohio Benefit statute. The case went to trial before a three-judge court and the Bureau argued abstention for the first time at trial. In this case, Respondent Cook County raised abstention at the first opportunity after state court proceedings had been instituted, long before any trial was anticipated. *Hodory* is thus clearly distinguishable from this case, since that case actually proceeded to trial on the merits.

In *Association of Community Organizations for Reform Inc. v. Municipality of Golden*, 744 F.2d 739 (10th Cir. 1984), the Court of Appeals for the Tenth Circuit noted that although the *Younger* abstention doctrine could have applied to one of the named defendants, the government's decision to stay the criminal action pending against that defendant and to proceed in the federal court to trial effectively waived the *Younger* abstention. In the instant case, the County never sought to stay the state court action but amended the state court action to include the counts alleging violation of the County Adult Use Ordinance at the earliest appropriate time after this Court's decision in *Renaissance*. In *ACORN v. Municipality of Golden*, *Id.* the case proceeded to trial and the issue of abstention which was never raised by any of the parties was addressed in *dicta* in a footnote by the Court of Appeals. This *dicta* obviously has no applicability to the instant case in which the Court of Appeals for the Seventh Circuit affirmed the district court's *Younger* abstention where it was raised as soon as parallel state proceedings were initiated and while the federal proceedings were still in an "embryonic stage." *Mannheim Video Inc.*, 884 F.2d at 1046.

Likewise, Petitioner's citation of *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980) does not support its argument that the County's *Younger* argument was waived. In *Vance*, the three judge district court found *Younger* inapplicable because no prosecution either criminal or civil was pending at the time the case proceeded to a hearing on the merits. On appeal, the *Younger* abstention issue was not even raised and in *dicta* in a footnote the Court of Appeals for the Fifth Circuit simply commented that the issue of a *Younger* abstention was not jurisdictional and was therefore not reviewable. The Court also noted there were no parallel state proceedings pending when suit was brought. Universal is totally unlike the instant case, wherein a parallel pending court proceeding was amended after the initiation of the federal action, but before any proceedings on the merits of the case had taken place.

Clearly, none of the cases relied upon by Petitioner demonstrate that a conflict exists between the circuits. Moreover, the cases cited all involve situations unlike the instant case. The Court of Appeals followed established precedent set forth by this Honorable Court and is consistent with other circuits in finding that the district court properly abstained in favor or a parallel state action. Petitioner's waiver argument which is without basis in either fact or law is clearly meritless. Therefore, certiorari should be denied.

II.

THE COURT OF APPEALS FOLLOWED ESTABLISHED PRECEDENT IN FINDING THAT WHERE THE DISTRICT COURT HAD SIMPLY DENIED IN PART AND ALLOWED IN PART, RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION THE FEDERAL PROCEEDINGS WERE STILL IN AN EMBRYONIC STAGE.

Petitioner next argues that the court below erred in finding that the District Court proceedings remained in an "embryonic stage." According to Petitioner, the district court's denial of the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should have been construed as a substantial proceeding of substance on the merits.

Respondent maintains that the Court of Appeals for the Seventh Circuit correctly applied the facts in this case to the well-established law governing abstention when it determined that "the federal proceeding was still in an embryonic stage," at the time the case was dismissed in favor of the parallel state proceeding.

Petitioner does not attack the soundness of the Seventh Circuit's legal reasoning. Nor does it dispute the well-established law which provides that in a case where state proceedings follow initiation of a federal action, the federal action should be dismissed in favor of the state action if there have been no substantial proceedings on the merits or the federal action is in an "embryonic stage." *Hicks v. Miranda*, 422 U.S. 322; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929; *Ciotti v. County of Cook*, 712 F.2d 312, 313-314; *State of Illinois v. General Electric Co.*, 683 F.2d 206, 212 (7th Cir. 1972).

Petitioner argues only that the Seventh Circuit should have concluded that the district court's denial of Cook

County's Motion to Dismiss as to Count I of its complaint amounted to a substantial proceeding on the merits. The Seventh Circuit in rejecting this argument relied on the case of *Ciotti v. Cook County*, 712 F.2d 312 (7th Cir. 1983) and found that the denial of the County's 12(b)(6) motion as to Petitioner's only viable Count in his Complaint (Count I) was not a substantial proceeding on the merits, but simply a determination that the County was unable to show "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Mannheim Video, Inc.*, 844 F.2d at citing, *Conley v. Gibson*, 355 U.S. 41 (1957). The Court therefore concluded:

> As in *Ciotti*, apart from the district court's decision on the County's motion to dismiss the second count, "the record indicates no other proceedings—for instance, depositions taken, discovery completed, or briefs filed on the issues—that would suggest advancement toward a determination of the merits. The federal proceeding was still in an embryonic stage." *Ciotti*, 712 F.2d at 314; see also citations therein. *Mannheim Video, Inc.*, 884 F.2d at 1045-1046.

Although Petitioner cites a plethora of case law on the doctrine of abstention, it does not cite a single case which supports its position that the denial of the motion to dismiss Count I constituted a substantial proceeding on the merits. Its wealth of cited case law nowhere criticizes the *Ciotti* decision, finds inconsistently with it, or distinguishes it. To the contrary, the decision of the court below followed established precedent and accurately and correctly applied that law to the facts of this case. Therefore, Petitioner's attempt to gain certiorari on this issue must fail.

III.

PETITIONER'S REQUEST THAT CERTIORARI BE GRANTED IN ORDER TO CLARIFY THE LANGUAGE OF THE OPINION OF THE COURT BELOW IS AN ATTEMPT TO PRESENT ISSUES WHICH HAVE BEEN WAIVED IN THE COURTS BELOW BY PETITIONER.

Petitioner lastly contends that this Court should grant certiorari in this case to clarify the language of the decision of the court below, which it speculates could cause confusion as to the scope of the *Younger* abstention in the instant case. Respondent maintains that Petitioner's argument is not only speculative, but is an attempt to raise issues which have not been properly preserved for review and to thereby avoid the consequences of Petitioner's own failure to act.

The district court dismissed Counts II and III of petitioner's complaint for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). Thereafter, the district court abstained from deciding Count I of Petitioner's complaint on the basis of *Younger*.

Petitioner never sought to amend his complaint or to otherwise challenge or seek a clarification of the district court's ruling on the dismissals of Counts II and III before filing its notice of appeal. Instead, Petitioner proceeded to file its notice of appeal and briefs in this matter in the Seventh Circuit challenging only the propriety of the abstention on Count I. Petitioner waited until after the Seventh Circuit rendered its opinion and then filed a petition for rehearing in which he claimed the language of the opinion of the Seventh Circuit was confusing as to its possible *res judicata* effects regarding Counts II and III of its complaint.

Petitioner now admits that it will be able to raise Count I in the state court and concedes that this Court's ruling in *Renaissance Arcade*, 109 S.Ct. 209 (1988) precludes it from raising Count III. (Petition at 23) However, petitioner submits that because the state court could conclude that it is barred by *res judicata* from raising Count II due to the district court's dismissal of that claim or that any "similar but distinct" claims it may seek to raise may also be barred, the language of the court below should be clarified.

Though not appealable at the time the district court dismissed Counts II and III, the dismissal of Counts II and III became final and appealable once Petitioner filed its notice of appeal on Count I. With any complaint containing multiple counts the disposition of one is not a final judgment and is not appealable unless the district court certifies it for a direct appeal. *Universal Life Insurance Co. v. Unimarc*, 699 F.2d 846 (7th Cir. 1983). However, an appeal from a final judgment brings up all antecedent issues and a collateral order may be appealed at the end of the case. *Matters of Kilgus*, 811 F.2d 1112 (7th Cir. 1987).

It is clear therefore that Petitioner should have appealed the dismissal of Count II and III at the time he appealed the Court's dismissal on abstention grounds of Count I. Petitioner's failure to do so in a timely manner clearly serves as a waiver of this matter. *Bailey v. Bicknell Minerals*, 819 F.2d 690 (7th Cir. 1987). Moreover, since a final judgment has been entered and no appeal taken, Appellant may now be precluded by *res judicata* from relitigating Counts II and III of his complaint in state court. *See*, Generally, *Restatement of Judgments*, 1981, §87, *Federal Practice and Procedure*, 1981, Wright, Miller, Cooper

§4468, *Cannon v. Loyola University of Chicago*, 784 F.2d 777 (7th Cir. 1986).

This Court will not ordinarily decide questions not raised or resolved in the court below. *Youkaim v. Miller*, 425 U.S. 231, 234 (1976). Additionally, Plaintiff's manipulations of the Federal Rules of Civil Procedure to relitigate in state court issues that have been finally resolved do not justify a grant of certiorari. Furthermore, Petitioner's speculation as to whether or not it will be able to raise what it claims to be related but similar issues is clearly a matter to be resolved by the state court. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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